No. 78-68

In the Supreme Court of the United States

OCTOBER TERM, 1978

AURORA GAZMIN NAVARRO, PETITIONER

v.

DISTRICT DIRECTOR OF THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. A) is reported at 574 F. 2d 379. The original opinion of the court of appeals (Pet. App. B) is reported at 539 F. 2d 611. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on April 12, 1978. The petition for a writ of certiorari was filed on July 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District Director of the Immigration and Naturalization Service had "good and sufficient cause," within the meaning of Section 205 of the Immigration and Nationality Act, 8 U.S.C. 1155, to revoke petitioner's third preference classification.

STATUTE INVOLVED

Section 205 of the Immigration and Nationality Act, 66 Stat. 180, as amended, 8 U.S.C. 1155, provides in pertinent part:

> The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 * * *.

Section 203(a)(3) of the Act, 66 Stat. 178, as amended, 8 U.S.C. 1153(a)(3), provides in pertinent part:

> Aliens who are subject to the numerical limitations specified in section 201(a) * * * shall be allotted visas or their conditional entry authorized, as the case may be, as follows:
>
> * * * * *
>
> (3) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 201(a)(1) or (2) * * *, to qualified immigrants who are members of the professions, or who because of their exceptional ability in the sciences or the arts will substantially benefit prospectively the national economy, cultural interests, or welfare of the United States * * *.

STATEMENT

The facts are set forth in detail in the opinion of the court of appeals on rehearing and may be summarized as follows. Petitioner is a native born citizen of the Philippines, where she is licensed to practice as a

registered nurse. In February 1971, she entered the United States as a nonimmigrant exchange visitor to study in the graduate nurses' training program at the Kansas City General Hospital and Medical Center (Pet. App. 2-3). On August 11, 1971, while still at Kansas City General, she filed a petition for classification as a "third preference immigrant" under Section 203(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(a)(3); that is, as an alien who is a "member of the professions." She sought that status in order to obtain permanent residence in the United States. Under the statutory scheme, persons granted third preference classification have a certain priority for obtaining visas for immigration as permanent residents. See Pet. App. 14-15. On October 4, 1971, the District Director approved her petition for third preference status. The notice of approval stated: "[T]he approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession * * *" (Pet. App. 3).

In 1972, after petitioner's contract with Kansas City General expired, she twice took the Missouri State Board of Nursing licensing exam. She passed three sections of the exam, but failed the other two. Unable, as a result, to secure employment as a registered nurse, she was hired by Trinity Lutheran Hospital as an unlicensed practical nurse (Pet. App. 4).

On July 11, 1973, the District Director notified petitioner that, "[s]ince you have failed to qualify as a registered nurse in over two years following entry, it does not appear you should have been accorded third preference; and this office contemplates revocation of the approved visa petition" (Pet. App. 21). Action on the intended revocation, however, was withheld in order to

allow petitioner another opportunity to take the licensing examination. On November 13, 1973, after petitioner failed the licensing exam for the third time, the District Director advised her by letter (Pet. App. F) that her third preference status had been revoked, explaining:

> Your petition for third preference was approved because you claimed you expected to be employed as a member of the professions. Inasmuch as you again failed to pass the licensure test of the Missouri State Board of Nursing on September 12-13, 1973, you have not as yet qualified as a registered nurse, but have had to accept employment in a lesser capacity. Since you entered the United States on February 10, 1971, to take Graduate Nurse Training, it is believed you have had ample opportunity to qualify as a registered nurse.

(See Pet. App. 5-6.)

Petitioner appealed to the Regional Commissioner who upheld the revocation decision on January 23, 1974 (Pet. App. F), and on August 26, 1974, denied her motion to reconsider (Pet. App. D). Meanwhile, petitioner was notified that she was required to depart from the United States on or before March 8, 1974 (Pet. App. 6).

On October 16, 1974, petitioner brought this action for a declaratory judgment in the United States District Court for the Northern District of Illinois. The court granted respondent's motions to dismiss the complaint and for summary judgment (Pet. App. 33), finding that it lacked jurisdiction and that respondent had not been "arbitrary or capricious" in revoking the petition. Petitioner appealed and on September 13, 1977, the court of appeals, Judge Pell dissenting, vacated the judgment of the district court

and remanded the case (Pet. App. B).[1] On petition for rehearing the attention of the court of appeals was drawn to Section 205 of the Act, 8 U.S.C. 1155, of which it had not previously been aware, and the court unanimously withdrew its earlier opinion and affirmed the judgment of the district court (Pet. App. A).

ARGUMENT

1. Petitioner's contention that the revocation of her third preference status was arbitrary and capricious is without merit. The Attorney General is specifically empowered by Section 205 of the Immigration and Nationality Act, 8 U.S.C. 1155, and its implementing regulations, 8 C.F.R. 204.4(d) and 205.2, to revoke the approval of any petition approved by him under Section 204 of the Act, 66 Stat. 179, as amended 8 U.S.C. 1154, "for what he deems to be good and sufficient cause." See *Wright* v. *Immigration and Naturalization Service*, 379 F. 2d 275, 276 (C.A. 6); *Scalzo* v. *Hurney*, 225 F. Supp. 560, 561 (E.D. Pa.), affirmed, 338 F. 2d 339 (C.A. 3).

Petitioner was originally accorded third preference status on the basis of her prior training and experience as a licensed nurse in the Phillipines. As the court of appeals noted in its first opinion, however (Pet. App. 15-16), it is the Service's position that while a person may be granted third preference status on the basis of his previous experience and licenses in his own country, he may lose that status if he fails to satisfy local licensing requirements in the United States after a reasonable period. Since enter-

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[1] The court of appeals remanded for further consideration of whether petitioner's original status as an exchange visitor under 8 U.S.C. 1101(a)(15)(J) should have foreclosed her from obtaining a preference classification under 8 U.S.C. 1153(a)(3)—an issue neither party had raised or briefed. See Pet. App. 28-29.

ing the United States in 1971, petitioner failed three times to pass licensing examinations, and to this date has provided no evidence that she has subsequently qualified as a registered nurse. The purpose of according third preference status to professionals is to enable them to emigrate to the United States and benefit this country by practicing their profession. In view of that purpose, petitioner's inability, after more than two years' residency in the United States, to become a licensed member of her profession by passing a licensing exam clearly provided "good and sufficient cause" to revoke her preference. In short, the District Director did not abuse his discretion in revoking petitioner's petition. See *Kashani* v. *Immigration and Naturalization Service*, 547 F. 2d 376, 378 (C.A. 7); *Asuncion* v. *District Director*, 427 F. 2d 523, 525 (C.A. 9).[2]

2. Petitioner further contends (Pet. 10-11) that the revocation of her preference denied her equal protection of the law because, she argues, a registered nurse residing in the Philippines would not be required to pass a United States licensing exam to obtain and retain a preference status. Petitioner did not raise this issue in the court of appeals and is therefore precluded from raising it here for the first time. *United States* v. *Lovasco*, 431 U.S. 783, 788-789, n. 7. In any event, petitioner's claim is without merit. Unlike her hypothetical counterpart in the Phillippines, petitioner has given the Service a basis for

[2]We do not disagree with petitioner's contention (Pet. 8-9) that an applicant for third preference status is not required to engage in the qualifying profession immediately upon being admitted into the country. But petitioner has been given a more that ample opportunity to enter the nursing profession in the United States and has demonstrated her inability to do so. Moreover, should petitioner subsequently become licensed in her field, she is not barred from seeking preference classification again.

concluding that she is not entitled to a preference as a professional. There is therefore a rational basis for treating petitioner differently. *Stanton* v. *Stanton*, 421 U.S. 7, 14; *Francis* v. *Immigration and Naturalization Service*, 532 F. 2d 268, 272 (C.A. 2). Moreover, if petitioner's hypothetical counterpart in the Philippines provided the Service with a basis for concluding that she was not qualified, the Service would be justified in revoking her status as well.

3. Petitioner contends (Pet. 12-13) that the government is estopped from revoking her third preference status based on representations made in its October 4, 1971 notice of approval of her petition. The notice stated in pertinent part: "[T]he approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession"[3] (Pet. App. 3). The notice was designed to warn petitioner about two common grounds for invalidation of petitions; it was not intended to make those grounds the only basis for termination. For example, the government would clearly not be estopped from revoking its approval for fraud, even though the notice contained no warning to that effect. Moreover, nothing in the notice purports to waive or limit the Attorney General's power under Section 205. In short, we are presented here with nothing even approaching that "affirmative misconduct" which this Court has held is necessary to estop the government in immigration matters. *Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5; see *Santiago* v. *Immigration and Naturalization Service*, 526 F. 2d 488 (C.A. 9).

[3]This language follows verbatim that of 8 C.F.R. 204.4(b), which governed approval of petitions in 1971.

In any event, as the court of appeals indicated (Pet. App. 12), the record shows that "the petitioner never was ignorant of the potential loss of her third preference status if she did not within two years qualify as a registered nurse." Indeed, she does not allege in her petition that she in any way relied to her detriment on representations made in the October 4 notice. She originally came to the United States as an exchange visitor to study nursing. She did not apply for third preference status until she had already been in the country for eight months. She does not allege that she would have returned to the Philippines if she had known (assuming she did not know) her petition could be revoked; to the contrary, it was her clear intention to try to pass the Missouri licensing examination. There having been no detrimental reliance, there can be no estoppel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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